No. 10117.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GUSTAVE L. GOLDSTEIN, as Trustee in Bankruptcy of the Estate of Marvin Polakof,

Appellant,

vs.

MARVIN POLAKOF and IVAN POLAKOF,

Appellees.

APPELLANT'S REPLY BRIEF.

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TABLE OF AUTHORITIES CITED.

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APPELLANT'S REPLY BRIEF.

I.

In their brief the appellees have carefully refrained from discussing the principal fact which appears undisputedly from the evidence, *i. e.*, that it was their father, Sam Polakof, who conducted the business and managed the real estate as the property of the family and that there was no real line of demarcation where the interests of Ivan Polakoff ended and those of Marvin Polakoff began.

Instead, the appellees have again relied upon the fiction that Ivan bought the property, that it never belonged to Marvin, that it was not held out to the creditors of the business, etc.

In our main brief we have summarized the documentary and disinterested testimony which entirely refutes this fiction and shows the real purpose of the various manipulations to have been to keep the property in the family under all circumstances. There is, therefore, no need to discuss the testimony again in this reply.

There is one matter, however, which we again call to this court's attention.

The appellees persist in arguing that Marvin Polakoff did not hold the property out to the creditors as part of his assets. This misleading argument deliberately overlooks the financial statement issued by Sam Polakoff on March 1, 1940, which listed this property as the most valuable asset of the business. [Pl's. Exhibit 7, R. 147-151.] The property is fully described in the itemized statement [R. 151] and there can be no question as to what was intended. The argument that the property was not held out to the creditors is therefore baseless and comes with ill grace.

II.

The appellees cite the case of *Fares v. Morrison,* 4 A. C. A. D. 1022, in support of their argument that the appellate court will not interfere with the conclusions of a trial court as to the weight of evidence. That principle is correct in the California state courts, but it has no application in an equity appeal before the federal courts.

In addition to the authorities quoted on pp. 20-21 of our main brief we quote the following from *Aro Equipment Corporation v. Herring-Wissler Co.,* 8 Cir., 84 Fed. 2d 619, 621:

> "An appeal in equity brings before the appellate court the whole record, and the court is required to

> examine the record and try the case *de novo*. The findings of the trial court, while entitled to great weight, may be adopted or discarded by the appellate court, even though supported by substantial evidence."

Such a rule is particularly applicable in this case, where the appellant's case is supported by the documentary and disinterested evidence. The trial court's opportunity to observe the witnesses and their demeanor, which is frequently given as the reason to affirm findings based upon conflicting evidence, does not apply in this case.

III.

We readily concede that a trustee in bankruptcy cannot attack a conveyance of property which the bankrupt held in trust for another person.

But that principle has no application herein. Marvin Polakoff never held the property in trust for Ivan Polakoff. It was property owned by Marvin for the Polakoff family, just as the wine distributing business was so owned and conducted. The creditors of the business are therefore entitled to look to the property for a satisfaction of their just claims.

Respectfully submitted,

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